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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

LUBBOCK INDEPENDENT SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

LUBBOCK CIVIL LIBERTIES UNION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether it is an unconstitutional establishment of religion to permit voluntary student religious groups to use public school facilities for meetings outside regular school hours on the same basis as other voluntary student groups.*

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* The appellant in the court of appeals was the Lubbock Civil Liberties Union. The appellees were the Lubbock Independent School District; Monte Hasie, the president of the Board of Trustees of the School District; Jose S. Ramirez, Brad Crawford, Deaton Rigsby, Giles M. Forbess, Harold Harriger, and Lynn Stafford, the members of the Board of Trustees; and Edwin H. Irons, the Superintendent of the School District.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Lubbock Independent School District, the president and members of its Board of Trustees, and its Superintendent, hereby petition for a writ of certiorari to review the judgment of the court of appeals.[1]

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 669 F.2d 1038. The opinion of the district court (App. B, *infra*) is not reported.

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[1] The president of the Board of Trustees is Monte Hasie. The current members of the Board are Jose S. Ramirez, Brad Crawford, Deaton Rigsby, Lynn Stafford, Elizabeth Sisco, and Gary O. Boren. The Superintendent of the School District is Edwin H. Irons.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*) was entered on March 11, 1982. The court's order denying rehearing and suggestion of rehearing *en banc*, with dissenting opinion (App. D, *infra*), was entered on July 16, 1982. On September 22, 1982, Justice White extended the time within which to file a petition for a writ of certiorari to and including November 13, 1982. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND REGULATION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Paragraph 4 of the August 26, 1980, statement of policy of the Lubbock Independent School District provides:

> The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

STATEMENT

Respondent Lubbock Civil Liberties Union instituted this civil action in September, 1979, in the United States District Court for the Northern District of Texas. Respondent contended that certain practices permitted by

petitioner Lubbock Independent School District, such as the reading of Biblical passages over school public address systems, violated the Establishment Clause of the First Amendment. Pursuant to 42 U.S.C. § 1983, respondent sought damages and declaratory and injunctive relief.[2]

The pendency of litigation caused the School District's Board of Trustees, which is authorized by state law to make rules and regulations for the School District,[3] to review existing policy and practices. On the basis of this review, the Board determined to prohibit the practices that respondent had challenged. App. B, *infra*, pp. 30a-31a. On August 26, 1980, acting, as the district court found, "in good faith in seeking to draft a proper constitutional procedure," *id.* at 33a, the Board adopted a new statement of policy "relating to religion in the schools . . . ." *Id.* at 30a-31a n.1. This policy was expressly intended to maintain strict neutrality with regard to "the belief of any student in a Supreme Being or . . . the right of any student not to believe . . . ." *Id.*

Respondent nevertheless pressed forward with its claim for damages, for a declaratory judgment that the discontinued practices had been unconstitutional, and for an injunction prohibiting resumption of those practices. In addition, respondent challenged the facial validity of Paragraph 4 of the Board's new statement of policy, which had been designed to ensure that all voluntary student groups wishing to meet before or after school

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[2] The district court asserted jurisdiction under 28 U.S.C. §§ 1331 and 1343.

[3] Tex. Ed. Code Ann. § 23.26 (Vernon). *See* App. A, *infra*, p. 4a n.4.

would have equal access to the use of school facilities. Paragraph 4 provides:

> The School Board permits students to gather at the school with supervision either before or after regular school hours on the same basis as other groups as determined by the school administration to meet for any educational, moral, religious or ethical purposes so long as attendance at such meetings is voluntary.

Id.

Trial was held in November, 1980. At trial, respondent's president, Rodric Schoen, who is a professor of constitutional law at Texas Tech University, testified that, in his view, the policy of equal access was constitutionally sound on its face. Tr. 27-28.[4] He further testified that there had been no complaints by students or parents concerning implementation of that policy. *Id.*

After trial, the district court declared that the School District's discontinued practices had violated the Establishment Clause, but the court denied injunctive relief because of the absence of any continuing threat of harm and awarded only nominal damages. App. B, *infra*, pp. 32a-34a. The court further held that the School District's policy of equal access to the use of school facilities was not facially invalid:

> It is noted that this policy permits students of all groups to gather at the school, either before or after regular hours, on the same basis as other groups, so long as attendance at such meetings is voluntary. It is the undisputed testimony before this court that there will be no extra expense accruing to the Lub-

[4] "Tr." refers to the reporter's transcript of proceedings.

> bock Independent School District resulting from these meetings before or after school. In the event that such expense is incurred the group using the school facilities will be required to pay for same. Again, it is the implementation of this policy and the practices and acts thereunder that will be determinative of any constitutional violations. This court will not hesitate to assert its jurisdiction in the event that it is later shown that, pursuant to the policy, the defendants are permitting or encouraging acts or practices which violate either the establishment or the free exercise clause of the First Amendment.

Id. at 32a.

Respondent appealed to the United States Court of Appeals for the Fifth Circuit, urging that the district court had erred in denying injunctive relief and in refusing to declare invalid the policy of equal access. The court of appeals affirmed the denial of injunctive relief on the ground that the School District's discontinued unconstitutional practices were unlikely to be resumed. App. A, *infra*, pp. 22a-23a. But the court held that the School District's policy of equal access is invalid on its face.

In addressing respondent's challenge to that policy, the court of appeals applied the three-part test of *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-13 (1971):

> does the policy or practice have a secular (non-religious) purpose? Is the primary effect of the policy or practice one which neither advances nor inhibits religion? Does the policy or practice avoid an excessive entanglement with religion?

App. A, *infra*, p. 12a.

First, the court acknowledged that the Second Circuit "has recognized that '[a] neutral policy granting all student groups, including religious organizations, access to school facilities reflects [a] secular, and clearly permissi-

ble purpose—the encouragement of extra-curricular activities.' " *Id.* at 13a (quoting *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d 971, 978 (2d Cir. 1980), *cert. denied*, 71 L. Ed. 2d 109 (1981)). The court nevertheless held that the School District's policy of equal access has no secular purpose because "[i]t appears in the middle of a policy concerned with religious activities in the schools." *Id.*

Second, although the School District's stated policy refers only to meetings "before or after regular school hours on the same basis as other groups," the court characterized it as a "policy of allowing religious meetings at a time closely associated with the beginning or end of the school day." *Id.* at 15a. This, the court held, was unconstitutional:

> [It] implies recognition of religious activities and meetings as an integral part of the District's extra-curricular program and carries with it an implicit approval by school officials of those programs. This, in combination with the impressionability of secondary and *primary* age school children and the possibility that they would misapprehend the involvement of the District in these meetings, renders the primary effect of the policy impermissible advancement of religion.

Id. at 15a-16a (emphasis in original).

Third, the court determined that supervision by school personnel, which is furnished whenever school facilities are used by voluntary student groups in order to protect both students and facilities, *see id.* at 18a-19a, "create[s] the entanglement which leads to an impermissible establishment of religion." *Id.* at 20a.[5]

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[5] The court further concluded that "Paragraph 4 is in no way mandated by the free exercise clause," *id.*, or by other provisions of the First Amendment.

Four judges dissented from the denial of rehearing *en banc*, pointing out that the court's decision appears to hold:

> (1) "that students of public schools may not meet in school facilities for religious purposes," App. D, *infra*, p. 39a;
>
> (2) "that permissible secular purposes, the development of leadership and communicative skills, can be attained only through non-religious student associations"—a holding "inconsistent with *Brandon*," *id.* at 40a;
>
> (3) that establishment of religion inheres in the fact that "the machinery of public education . . . provides the *students* themselves who get together and make the decision to form some organization to meet at any time, even after they have first departed and then returned to the school building," *id.* (emphasis in original); and
>
> (4) that "excessive entanglement [equates] with the minimal precautions the school would have to take for its property and rules when any student group meets in its facilities," *id.* at 41a.

The dissenters concluded:

> We should not forget . . . that the young student may . . . be given the impression that our government and the courts and the schools are hostile to all religious belief and practice. [We] would consider that a very great wrong to the children, to the Constitution and to the nation.

Id.

REASONS FOR ALLOWING THE WRIT

1. The Fifth Circuit has held that it is an unconstitutional establishment of religion for a public school board to adopt a neutral, nonpreferential policy that allows

voluntary student religious groups to meet in school facilities, before or after regular school hours, on the same basis as other voluntary student groups.[6] The issue is important. Its resolution will affect the interests of more than forty million public school students and will furnish almost ninety thousand public schools with definitive guidance concerning the extent, if any, to which they may provide an opportunity, outside school hours, for noncurricular, student-initiated religious speech and association.[7]

The Fifth Circuit's decision appears to be inconsistent with this Court's decision last Term in *Widmar* v. *Vincent*, 70 L. Ed. 2d 440 (1981). In *Widmar*, this Court held that a public university may not deny voluntary student groups equal access to the use of university facilities based upon the religious content of their speech. In contrast, the Fifth Circuit in this case has held that a public school is barred from granting voluntary student groups equal access to the use of school facilities because of what the court perceived to be a constitutionally dictated need to discriminate against religious speech. Thus, the question presented here is whether a public school *may* pro-

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[6] The decision below already has engendered discussion on the Senate floor, where its implications have been labeled "ridiculous in a free society dedicated to the principles of free thought." 128 *Cong. Rec.* S 11780 (daily ed. Sept. 17, 1982) (Senator Hatfield).

[7] In the school year 1978-79, approximately 42.6 million pupils were enrolled in public elementary and secondary schools. Department of Commerce, *Statistical Abstract of the United States* 153 (101st ed. 1980). During 1977, the fifty states and the District of Columbia operated a total of 88,025 public schools. *Id.* at 139. Puerto Rico, American Samoa, the Virgin Islands, and the Canal Zone operated an additional 1,940 public schools. *Id.*

vide voluntary student religious groups with the equal access that a public university *must* provide under *Widmar*.[8]

By holding that a public school board's policy of equal access is facially invalid, the Fifth Circuit has propounded a peculiar constitutional paradox. According to the Fifth Circuit, the Constitution *requires* public schools to discriminate against religious speech even though it *forbids* public universities from doing so. This result is inherently implausible. The Establishment Clause of the First Amendment draws no such bright line between public schools and public universities. *See Zorach* v. *Clauson*, 343 U.S. 306 (1952). Moreover, public school students, like university students, have the right of free speech on school property, even as to controversial subjects. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 512-13 (1969).

This Court should review the decision below in order to provide needed guidance to public school boards and to ensure that the First Amendment is applied even-handedly to public schools and their students in a manner that conforms with the Court's decision in *Widmar*.

2. The Fifth Circuit misapplied the three-part test of *Lemon* v. *Kurtzman*. A neutral, nonpreferential policy of equal access has a secular purpose; the principal or primary effect of such a policy neither advances nor inhibits religion; and such a policy does not foster "an excessive

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[8] Thus, the question presented here is different from that in *Brandon* v. *Board of Education of Guilderland Central School District*, where the plaintiffs contended that public schools *must* provide student religious groups with equal access to the use of school facilities.

government entanglement with religion." *Walz* v. *Tax Commission*, 397 U.S. 664, 674 (1970).

a. In *Widmar*, this Court recognized that "an open-forum policy, including nondiscrimination against religious speech, would have a secular purpose . . . ." 70 L. Ed. 2d at 448-49 (footnotes omitted). A policy of equal access to school facilities affords students with similar interests an opportunity voluntarily to associate with one another in pursuit of those interests, to engage in the exchange of ideas, and to develop the skills of communication, cooperation, and self-government. Such a policy fosters the students' intellectual, cultural, and social growth and thereby furthers the essential goals of public education. Constructive extracurricular activities have obvious secular value, for they provide forums for the exercise of the First Amendment freedoms of speech and association that lie at the heart of our democracy. A policy that facilitates participation in such activities serves "a secular, and clearly permissible purpose . . . ." *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d at 978.[9]

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[9] The court of appeals below acknowledged the secular value of constructive extracurricular activities but nevertheless disapproved the School District's policy of equal access on the ground that "[i]t appears in the middle of a policy concerned with religious activities in the schools." App. A, *infra*, p. 13a. It is difficult to grasp the point of the court's objection. The School District's general statement of policy was "concerned with religious activities in the schools," *id.*, for a wholly blameless reason: it was adopted for the purpose of terminating the practices of which respondent had complained and replacing those practices with a posture of strict neutrality toward religion. The articulation in such a context of an otherwise unobjectionable policy of equal access is not incompatible with a secular purpose or effect.

b. In *Widmar*, this Court was "unpersuaded that the primary effect of the public forum, open to all forms of discourse, would be to advance religion." 70 L. Ed. 2d at 450. The Court explained:

> It is possible—perhaps even foreseeable—that religious groups will benefit from access to University facilities. But this Court has explained that a religious organization's enjoyment of merely "incidental" benefits does not violate the prohibition against the "primary advancement" of religion.

Id. The same analysis applies to the School District's neutral policy of equal access to the use of school facilities. That policy benefits students, not religion or religious institutions. Like the loan of textbooks in *Meek* v. *Pittenger*, 421 U.S. 349 (1975), and *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and the reimbursement of bus transportation expenses in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the School District's policy merely makes available to all children the benefits of a general program of access to school facilities for extracurricular purposes.

The School District's policy of equal access to the use of school facilities, like the public university's open forum in *Widmar*, "does not confer any imprimatur of State approval on religious sects or practices." 70 L. Ed. 2d at 450. The court below perceived an imprimatur of state approval in "the Texas compulsory education machinery that draws the students to school and provides any audience at all for the religious activities . . . ." App. A, *infra*, p. 17a. The School District's policy of equal access, however, deals solely with voluntary groups and student-initiated activities; it does not authorize the presentation of state-initiated religious activities to passive student audiences. Nor does the policy permit the use of school facilities during the official school day; voluntary student religious

groups are permitted to hold their meetings only outside regular school hours, *i.e.*, only at times when the "Texas compulsory education machinery" is ineffective to provide an "audience."

The lower court confused self-initiated student religious meetings held outside the school day with passive student responses to state-initiated religious programs or activities presented during school. This led the court to rely upon inapposite school prayer cases and incorrectly to identify the mere existence of state compulsory education laws with "the use of coercion to get public school students into religious classrooms." *Zorach* v. *Clauson*, 343 U.S. at 311.[10] The School District's policy of equal access, like the "released time" program in *Zorach*, entails no state sponsorship or coercion of any kind. Nor does the policy "operate[] in such a way as to infringe the rights of free exercise of [nonparticipating] children. . . ." *Abington School District* v. *Schempp*, 374 U.S. 203, 288 (1963) (Brennan, J., concurring). Students who do not wish to join in student-initiated religious activities outside school hours are perfectly free instead either to join in other student activities or to be absent from the school premises altogether, without any of the peer pressure of a class or assembly gathering.[11]

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[10] The facts that this case concerns only student-initiated activity and that the activity is conducted outside regular school hours both clearly distinguish it from such cases as *Stone* v. *Graham*, 449 U.S. 39 (1980), *Engel v. Vitale*, 370 U.S. 421 (1962), and *Karen B.* v. *Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 71 L. Ed. 2d 455 (1982), upon which the court of appeals relied. It is telling, in this connection, that Judge Clark, who wrote the opinion for the court in *Karen B.* v. *Treen*, dissented from the denial of rehearing *en banc* in this case.

[11] The court of appeals below speculated that the "impressionability" of public school children creates "the possibility that they would misapprehend the involvement of the District in these meetings

This Court in *Widmar* recognized that "[t]he provision of benefits to [a] broad . . . spectrum of groups is an important index of secular effect." 70 L. Ed. 2d at 450. Here, voluntary student groups of all types and descriptions—Boy Scouts, glee clubs, debating societies, chess clubs, dramatic societies, and numerous others—are eligible for the use of school facilities. The School District's nonpreferential policy of equal access merely permits student-initiated religious activities to compete in this marketplace of student ideas and activities on an equal basis. The court of appeals erred in not following this Court's determination in *Widmar* that "[a]t least in the absence of empirical evidence that religious groups will dominate . . . , the advancement of religion would not be the . . . 'primary effect.' " 70 L. Ed. 2d at 451.

c. In *Widmar*, this Court understood that a neutral "open-forum policy . . . would avoid entanglement with religion." 70 L. Ed. 2d at 448-49. The court below, how-

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. . . ." App. A, *infra*, p. 15a. But public school students not only are sufficiently mature to exercise the rights guaranteed by the First Amendment, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. at 506, but also "are surprisingly sophisticated, intelligent, and discerning." *Wilson* v. *Chancellor*, 418 F. Supp. 1358, 1368 (D. Or. 1976). *See also Russo* v. *Central School District No. 1*, 469 F.2d 623, 633 (2d Cir. 1972), *cert. denied*, 411 U.S. 932 (1973); *James* v. *Board of Education of Central District No. 1*, 461 F.2d 566, 574 (2d Cir.), *cert. denied*, 409 U.S. 1042 (1972).

The court below expressed concern over the possible application of the School District's policy to primary school students. App. A, *infra*, p. 15a. But it was improper for the court to resolve its doubts on that score by holding the policy facially invalid. The court of appeals should have reserved judgment, in the manner of the district court, concerning "the implementation of this policy and the practices and acts thereunder." App. B, *infra*, p. 32a.

ever, perceived an impermissible entanglement in the fact that, whenever school facilities are used by any student group, the School District " '*furnish*[es] *personnel* . . . for protection of such properties.' " App. A, *infra*, p. 19a (quoting petitioners' Trial Br. at 3) (emphasis added by court of appeals). But content-neutral supervision of the physical premises, which constitutes only "the minimal precautions the school would have to take for its property and rules when any student group meets in its facilities," App. D, *infra*, p. 41a, falls far short of the type of involvement in or interaction with religious affairs or activities that this Court has found impermissible in the past. *Compare, e.g., Lemon* v. *Kurtzman*, 403 U.S. at 615-22, with *Zorach* v. *Clauson*, 343 U.S. at 308-09.

Indeed, as this Court noted in *Widmar*, a policy of discrimination against religious speech or discussion would risk greater "entanglement":

> Initially, the University would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove "an impossible task in an age where many and various beliefs meet the constitutional definition of religion." There would also be a continuing need to monitor group meetings to ensure compliance with the rule.

70 L. Ed. 2d at 449 n.11 (citations omitted). Similar considerations apply here. A rule prohibiting student-initiated religious activities, to be effective, would require monitoring of the meetings of many student groups, such as philosophy clubs and debating societies, for the purpose of rooting out proscribed religious content. Such a process of monitoring and censorship would be far more inimical to First Amendment values, and would entail a far greater entanglement with religion, than the disinterested supervision contemplated by the School Dis-

trict's neutral policy of equal access to the use of school facilities.

3. In enforcing the Establishment Clause, this Court remains aware that "there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Walz* v. *Tax Commission*, 397 U.S. at 669. The policy of the School District in this case is precisely one of benevolent neutrality. The School District has earnestly sought to accommodate religious and nonreligious interests on equal grounds. "Such an accommodation 'reflects nothing more than the governmental obligation of neutrality in the face of religious differences, and does not represent that involvement of religious with secular institutions which it is the object of the Establishment Clause to forestall.'" *Wisconsin* v. *Yoder*, 406 U.S. 205, 234-35 n.22 (1972) (quoting *Sherbert* v. *Verner*, 374 U.S. 398, 409 (1963)). *See also Roemer* v. *Board of Public Works of Maryland*, 426 U.S. 736, 745-46 (1976).

The decision of the court below is incompatible with this Nation's historic tolerance for neutral accommodation of religious beliefs, practices, and interests. The court's opinion conveys the opposite message "that our government and the courts and the schools are hostile to all religious belief and practice." App. D, *infra*, p. 41a.[12]

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[12] The court's opinion teaches Lubbock school children that speech is "free" only so long as it is purged of religious content and that governmental "neutrality" requires invidious discrimination against their own voluntary, self-initiated religious activity. Such "[m]isconceptions over the appropriate roles of church and state learned during one's school years may never be corrected." *Brandon* v. *Board of Education of Guilderland Central School District*, 635 F.2d at 978.

This message is not constitutionally mandated, and it is erroneous in fact. "We are a religious people whose institutions presuppose a Supreme Being." *Zorach* v. *Clauson*, 343 U.S. at 313. The School District's neutral policy of equal access represents a sound accommodation of the interests of a religious people within the framework of the First Amendment, and as such it should have been sustained.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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